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No. 00-1311

IN THE

Supreme Court of the United States

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

v.

JILL BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* EL PASO COUNTY, TEXAS AND THE EL PASO COUNTY SHERIFF IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

El Paso County, Texas, has a population of nearly 700,000 people. Its sheriff employs 763 full-time deputies and 15 reserve deputies. Because the county and the sheriff are periodically sued under § 1983 for alleged failure to train, generally resulting in summary judgment in their favor, both have a vital interest in the standard of liability applied in this case.

SUMMARY OF THE ARGUMENT

The Fifth Circuit should have reviewed the respondent's single-incident failure-to-train claim under the standard established by this Court, addressing: (1) whether the respondent's Fourth Amendment rights were violated by a reserve deputy sheriff as alleged; and if so, (2) whether the sheriff failed to train reserve deputies to handle recurring situations presenting an obvious potential for such violations; and (3) whether, in light of a reserve deputy's duties, the need for more or different training was so obvious that the sheriff could reasonably be said to have been deliberately indifferent to the need.

Instead, the Fifth Circuit erred by creating its own totality-of-circumstances standard. Under this new hybrid standard it held that, in evaluating the respondent's failure-to-train claim, the jury could properly have considered the following additional factors: (1) the personal background of the reserve deputy who allegedly violated the respondent's

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1. This brief was filed with consent of both parties and was authored in whole by counsel for the *amici curiae* with no monetary contribution from any outside source for its preparation or submission.

federal rights; (2) the on-the-job performance of this deputy; (3) a family relationship between the sheriff and this deputy; and (4) the sheriff's alleged failure to adequately supervise this deputy. Because consideration of any of these additional factors is inconsistent with the strict standards of culpability and causation this Court has established in § 1983 cases, the Fifth Circuit's augmented approach should be rejected in its entirety.

Further, had the Fifth Circuit reviewed the respondent's claim under the standard established by this Court, it could only have concluded that more or different training for Bryan County reserve deputy sheriffs was unnecessary, rather than so obviously needed that the sheriff could be said to have been deliberately indifferent to the need.

Note: El Paso County and the El Paso County Sheriff agree with the petitioner that, under the facts of this case, liability under § 1983 should not be imposed without a pattern or practice of constitutional violations and, further, that the record shows no decision by Sheriff Moore not to train or supervise Reserve Deputy Burns. To avoid repetition, these points will not be argued in this brief.

ARGUMENT

I. The Fifth Circuit erred by failing to apply the standard of liability established by this Court for a single-incident failure-to-train claim brought under § 1983.

Two separate claims under 42 U.S.C. § 1983 were submitted to the jury in this case: a single-incident failure-to-screen claim and a single-incident failure-to-train claim.

Brown v. Bryan County, Okla., 219 F.3d 450, 454 n.2 (5th Cir. 2000). In its 1997 opinion, this Court rejected the failure-to-screen claim, holding that several misdemeanor offenses in a reserve deputy sheriff's background, including a single assault conviction stemming from a campus fight, were insufficient to demonstrate a proclivity to violence against the person. *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 414 (1997). Without such a proclivity, the deputy's alleged use of excessive force in violation of the Fourth Amendment was not a plainly obvious consequence of the sheriff's decision to hire him. *Id.* at 415. In the absence of such a plainly obvious consequence, this Court held that the hiring decision, though it may have been ill-advised, failed to reflect deliberate indifference to the respondent's Fourth Amendment rights. *Id.*

This Court did not address the failure-to-train claim in its 1997 opinion because the Fifth Circuit had not yet addressed it. *Id.* at 402. Nevertheless, this Court hypothesized that it might be possible for a plaintiff to prevail on a failure-to-train claim against a municipality under § 1983 based on a single incident, that is, without showing a "pattern of constitutional violations." *Id.* at 409. But to do so, in addition to showing that a federal right was violated, the plaintiff would further have to show that the municipality "failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Id.* Moreover, the plaintiff would have to show that "in light of the duties assigned to specific officers or employees, the need for more or different training [wa]s so obvious . . . that the policymakers of the [municipality] can reasonably be said to have been deliberately indifferent to the need." *Id.* Deliberate indifference is a "stringent standard of fault,"

id. at 410, one the Court anticipated could be met in a single-incident failure-to-train context only in a "narrow range of circumstances," *id.* at 409.

On remand, without a new trial, the district court entered judgment in favor of the respondent on the single-incident failure-to-train claim. *Brown v. Bryan County, Okla.*, 219 F.3d at 453. When this judgment was appealed, the Fifth Circuit should have reviewed the failure-to-train claim under the standard established by this Court, addressing: (1) whether the respondent's Fourth Amendment rights were violated by the reserve deputy; and if so, (2) whether the sheriff failed to train reserve deputies to handle recurring situations presenting an obvious potential for such violations; and (3) whether, in light of a reserve deputy's duties, the need for more or different training was so obvious that the sheriff could reasonably be said to have been deliberately indifferent to the need.

Instead, the Fifth Circuit created its own totality-of-circumstances standard. Under this new hybrid standard, it held that, in evaluating the respondent's failure-to-train claim, the jury could properly have considered the following additional factors: (1) the personal background of the reserve deputy who allegedly violated the respondent's federal rights; (2) the on-the-job performance of this deputy; (3) a family relationship between the sheriff and this deputy; and (4) the sheriff's alleged failure to adequately supervise this deputy. Because consideration of any of these additional factors is inconsistent with the strict standards of culpability and causation this Court has established in § 1983 cases, the Fifth Circuit's augmented approach should be rejected in its entirety.

A. Personal background of reserve deputy whom sheriff allegedly failed to train should not have been considered.

1. Preclusion by this Court's opinion

The Fifth Circuit noted the following regarding the background of Reserve Deputy Stacy Burns ("Burns"), the officer who allegedly violated the respondent's federal rights:

> His record of having engaged in some inappropriate conduct before joining the force is undisputed. Within the two-year period before his hire, Burns had been arrested for assault and battery, resisting arrest, public drunkenness, driving while intoxicated, possession of false identification, driving with a suspended license, and nine moving traffic violations. At the time he was hired, Burns was in violation of the terms of his probation; for that reason he had an outstanding warrant for his arrest.

Brown v. Bryan County, Okla., 219 F.3d at 454-5.

The Fifth Circuit held that the jury could have found that this background should have alerted the sheriff to "an especially pressing need to train Burns, especially with respect to when and how to use force." *Id.* at 458. The Fifth Circuit further held that this "exuberant and reckless background" contributed to a "high predictability of citizen injury by the untrained Burns," *id.* at 462, supporting the jury's finding that, by failing to train him, the sheriff demonstrated deliberate indifference to the respondent's Fourth Amendment rights, *id.* at 463.

Even assuming personal background information might be relevant in a failure-to-train claim, such jury findings would be flatly inconsistent with the holding of this Court in this case regarding the exact same set of facts. This Court held that even the most damaging fact in Burns' background, a misdemeanor assault conviction, was, as a matter of law, insufficient to demonstrate a "proclivity to violence against the person." *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 414. Without such a proclivity, Burns' alleged use of excessive force could not have been a plainly obvious consequence of the decision to hire him. *Id.* at 415. In the absence of such a plainly obvious consequence, this Court held that the decision to hire Burns could not be said to have been made with deliberate indifference to the respondent's Fourth Amendment rights. *Id.*

Similarly, while thorough training in the use of force is both appropriate and necessary for all law enforcement officers, because Burns' background showed no proclivity towards violence, it could neither have alerted the sheriff to "an especially pressing need" to train him regarding "when and how to use force," 219 F.3d at 458, nor contributed to a "high predictability of citizen injury by the untrained Burns," *id.* at 462. That is, without a showing of proclivity to violence, Burns' alleged use of excessive force could no more have been a plainly obvious consequence of a failure to train him than of the decision to hire him in the first place. In the absence of such a plainly obvious consequence, there can be no finding of deliberate indifference or liability under § 1983.

The Fifth Circuit's failure to follow this Court's ruling on sufficiency of the evidence merits correction and should not be allowed to stand as precedent. Proponents of failure-to-screen claims lacking proof that the background of a job

applicant is plainly obvious to result in deprivation of a federal right should be barred from simply recasting such claims, without modification, as failure-to-train claims. The result is a second bite at the apple in which the same background of the same job applicant may be found to result in deprivation of the same federal right solely because a lesser standard of proof of underlying facts is required the second time around.

2. Irrelevance in the failure-to-train context

The Fifth Circuit's holding that the jury could have found a "high predictability of citizen injury" based on a failure to train Burns in light of his background, *id.* at 462, apart from being inconsistent with this Court's ruling on sufficiency of the evidence, further reflects a fundamental flaw in reasoning.

Had a stronger showing of propensity towards violence been made in this case, this Court might have reached a different conclusion regarding liability for the decision to hire Burns. Had his record reflected, for example, a string of recent felony convictions for violent crimes against the person, rather than a one-time misdemeanor stemming from a fraternity fracas, this Court might have concluded it was plainly obvious that hiring Burns would result in a high risk of the use of excessive force, thus justifying a finding that the sheriff was deliberately indifferent to the respondent's Fourth Amendment rights.

Significantly, however, the same reasoning cannot be imported into the failure-to-train context. It may be clear that *hiring* a violent person as a law enforcement officer creates an increased risk of violence against citizens, but it is unclear that *failing to train* such a person will have the same result

or the opposite. Sending a person with a violent predisposition to law enforcement training is like sending a schoolyard bully to karate class. It is possible the bully will come away from the class with a new-found sense of self-discipline and increased respect for others. On the other hand, it is equally possible the class will merely make the bully a more efficient bully, adding to his or her repertoire of tactics for forceful intimidation. Likewise, the failure to subject a violent individual to law enforcement training might represent a missed opportunity to set the individual straight, a chance to create in him or her a new-found respect for the law and the criminal justice system. Alternatively, it might represent a disaster averted, a fortuitous omission leaving the individual far less of a menace than training in law enforcement methods and tactics would have rendered him or her.

Thus, no matter how appropriate or valuable law enforcement training might be for other trainees, it cannot be said with any certainty whether exposing a person with violent tendencies to such training will be beneficial or detrimental. Without such an obvious consequence, there can be no finding of deliberate indifference and therefore no liability under § 1983.

The Fifth Circuit's holding that a law enforcement officer's personal background is relevant in a failure-to-train claim merits correction. Because it is logically flawed, it will likely result in misdirection of resources as municipalities struggle to resolve in the training context problems more appropriately addressed in the hiring/firing context.

B. On-the-job performance should not have been considered.

Regarding the on-the-job performance of Reserve Deputy Burns, the Fifth Circuit noted that within a matter of weeks of first joining the force, he "had already arrested some individuals, i.e., he was engaging in conduct with the potential for harm and that required training." 219 F.3d at 458. The Fifth Circuit further noted Burns' testimony at trial that "out of his twelve arrests, he had forced three or four individuals 'to the ground.' " *Id.* at 462. The Fifth Circuit concluded that these facts, like his personal background, contributed to "the high predictability of citizen injury by the untrained Burns," supporting the jury's finding that, by failing to train him, the sheriff demonstrated deliberate indifference to the respondent's Fourth Amendment rights. *Id.* at 462-63.

There is no question that a "pattern of constitutional violations" may form the basis for liability under § 1983. However, with respect to the conduct of Burns in making arrests, apart from the single incident involving the respondent, there is no allegation of constitutional harm. There is no suggestion that improper techniques were used. There is no suggestion of physical injury. There is no suggestion of the use of excessive force, for example, that the forcing of any individual to the ground might have been unwarranted under the circumstances. Although it noted that Burns used force more often than might be expected on average, *id.* at 462, the Fifth Circuit gave no indication of any reason whatsoever to believe that Burns acted in a less than appropriate or even exemplary manner in carrying out the arrest of any individual other than the respondent.

The Fifth Circuit may be correct that the act of arresting a person involves "the potential for harm" and "require[s] training." *Id.* at 458. However, the absence of any complaints associated with Burns' numerous prior arrests tends, if anything, to make his misconduct in arresting the respondent surprising rather than predictable. Certainly a law enforcement officer's unblemished, complaint-free arrest record, which includes several arrests that required the use of force, cannot be said to provide notice that the use of excessive force by the officer is plainly obvious to result if additional training is not provided. Without such a plainly obvious result, Burns' on-the-job performance cannot be considered evidence of deliberate indifference justifying imposition of liability under § 1983.

The Fifth Circuit's inclusion of on-the-job performance as a factor to be considered in the jury's evaluation of the respondent's failure-to-train claim is error that merits correction. The facts of this case provide no justification for revising this Court's standard to include such a factor.

C. Family relationship should not have been considered.

Reserve Deputy Burns was the son of the sheriff's nephew. *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 401. The Fifth Circuit held that the jury could properly have considered this fact as evidence that it was "highly unlikely that Burns was 'lost in the crowd,' and his training simply neglected." *Brown v. Bryan County, Okla.*, 219 F.3d at 458. The Fifth Circuit further held that, based in part on this family relationship, the jury could reasonably have inferred that the sheriff had "full notice of the full extent of Burns' exuberant and reckless background,"

and also notice of his " 'taking down' a number of arrest subjects." *Id.* at 462. The Fifth Circuit thus included this family relationship among the factors contributing to "the high predictability of citizen injury by the untrained Burns." *Id.*

First, whether the sheriff had notice of Burns' background is irrelevant in the failure-to-train context. This Court has already held that, as a matter of law, Burns' background did not demonstrate a proclivity to violence, *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 414, but even if it had, as pointed out in Section I.A.2. of this brief, it is unclear whether a failure to train him would have made matters better or worse.

Second, whether the sheriff had notice of Burns' conduct in making arrests is likewise irrelevant. As pointed out in Section I.B. of this brief, Burns' arrest record showed no pattern of constitutional harm or likelihood of such harm. If it had, the pattern itself would have served to provide notice for purposes of showing deliberate indifference under § 1983, and the existence of a family relationship would have added nothing. Thus, the fact that Burns and the sheriff were related is simply irrelevant.

The Fifth Circuit's error in including family relationship as a factor to be considered in failure-to-train claims merits correction. Inclusion of such an irrelevant factor could only mislead the jury regarding the proper basis for liability under § 1983.

D. Alleged failure to adequately supervise should not have been considered.

Regarding supervision of Reserve Deputy Burns, the Fifth Circuit noted that: (1) the sheriff may have failed to timely complete paperwork required to enroll him in state-mandated training, with the result that at the time of his encounter with the respondent, he may have had little or no classroom training; (2) no "enforcement mechanisms" were in place to ensure that deputies-in-training utilized instructional videotapes; (3) the sheriff had "no formal departmental policies regarding supervision of junior officers to assist Burns or to limit his conduct" and (4) the sheriff failed to "instruct deputies about their responsibilities to supervise a reserve deputy." *Brown v. Bryan County, Okla.*, 219 F.3d at 458. The Fifth Circuit held that lack of supervision was yet another factor contributing to "the high predictability of citizen injury by the untrained Burns," supporting the jury's finding that, by failing to train him, the sheriff demonstrated deliberate indifference to the respondent's Fourth Amendment rights. *Id.* at 463.

Like the risk associated with failure to properly screen a single job applicant, however, the risk associated with failure to properly supervise a single employee is "not 'obvious' in the abstract." *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 410. Rather, it will depend in part on the background and character of the employee in question. Some deputies-in-training may tend to be overly passive and averse to conflict, others overly aggressive and predisposed towards violence. Confronted with a dangerous situation on the street, without classroom training and close on-the-scene supervision, the former might tend to cower in the patrol car or even flee the scene, while the latter might

tend to engage in physically intimidating or abusive behavior. Similarly, given the opportunity to attend classroom training and/or view instructional videotapes, with no "enforcement mechanisms" to compel participation, some deputies-in-training might jump at the chance to learn to do their jobs properly, while others might tend to slack off. Thus, as in the failure-to-screen context, a "generalized showing of risk" from the failure to supervise cannot alone lead to a conclusion of deliberate indifference, *id.* at 410-11; it must further be shown that "[t]he connection between the background of the particular [employee] and the specific constitutional violation alleged [is] strong," *id.* at 412.

Again, this Court has already held that, as a matter of law, Burns' background did not demonstrate a proclivity to violence. *Id.* at 414. Further, nothing noted by the Fifth Circuit would suggest that Burns had a lack of interest in receiving training or in learning about proper law enforcement tactics and techniques. Without such tendencies, Burns' alleged use of excessive force could not have been the plainly obvious result of a failure to properly supervise him any more than of the decision to hire him. In the absence of such a plainly obvious consequence, a failure to supervise Burns cannot be said to have been the result of deliberate indifference to the respondent's Fourth Amendment rights.

Further, supposing Burns had demonstrated a high predisposition to violent behavior or a total disinterest in participating in training activities, it is far from obvious that any amount of compelled training, close supervision, or other measures short of discharging him would have solved the problem. Responsibility both for pre-employment screening to eliminate bad applicants and for resolving any serious background or character-related problems that may surface

during employment should begin and end in the hiring/firing sphere. No other municipal domain has the tools required to deal with such problems. It makes no sense to lay such problems at the doorstep of other municipal functions like supervising or training which, no matter how well-executed, are unlikely to provide a solution.

The Fifth Circuit's inclusion of failure to supervise as a factor to be considered in evaluating a failure-to-train claim is an error that merits correction. By placing irrelevant municipal deficiencies before the jury, this factor is likely to lead juries to disregard the strict standards of causation and culpability required in § 1983 cases.

II. Had it applied the standard established by this Court, the Fifth Circuit could only have concluded that more or different training for Bryan County reserve deputy sheriffs was unnecessary, rather than so obviously needed that the sheriff could be said to have been deliberately indifferent to the need.

As described by the Fifth Circuit, the training program for reserve deputies in Bryan County included the following: (1) Oklahoma's Commission on Law Enforcement Education and Training ("CLEET") classes; (2) Law Enforcement Training Network classes on videotape; and (3) on-the-job training. *Brown v. Bryan County, Okla.*, 219 F.3d at 455.

The CLEET program trains officers in "all aspects of law enforcement, including patrol tactics, the use of force, public safety, and the like" and specifically includes training on "the use of 'auto extraction techniques' such as the arm bar technique allegedly employed by Burns [during the incident forming the basis of the plaintiff's suit]." *Id.* n.6.

The Fifth Circuit noted that the parties agreed that CLEET training is mandatory for all Oklahoma law enforcement officers, including reserve deputies. *Id.* Significantly, the Fifth Circuit expressly stated that its opinion "should not be construed to reflect a finding that training through CLEET is somehow inadequate." *Id.*

Given the existence of such a comprehensive program, the centerpiece of which — CLEET training — the Fifth Circuit expressly declined to find deficient, the Fifth Circuit should have concluded that more or different training for Bryan County reserve deputies was unnecessary, rather than so obviously needed that the sheriff could be said to have been deliberately indifferent to the need.

Instead, the Fifth Circuit concluded that Bryan County had a "practice of providing no training" for reserve deputies. *Id.* at 456. Although this holding may in part refer to the sheriff's alleged failure to ensure that Burns actually participated in training, a supervisory deficiency addressed in Section I.D. of this brief, it appears to reach beyond that.

The Fifth Circuit found it relevant that "the County itself d[id] not train its officers," *id.* at 455, had "no funds to train personnel," *id.*, and thus had "a policy of providing no training itself," *id.* It pointed out that two expert witnesses "corroborated this lack of training." *Id.* It further pointed to testimony by an experienced deputy that he "had received no training from [Bryan] County." *Id.* These facts should have had no place in the Fifth Circuit's or the jury's consideration of this case. In the absence of a finding that CLEET was in some way deficient, it is simply irrelevant that the County itself provided no additional training.

In addition, the Fifth Circuit noted the following:

> We are sympathetic to the budget problems of local governments, especially rural counties. The plaintiff's expert, however, outlined a range of no-cost training options. The County's expert testified that CLEET provides training material for local police forces at no cost, will work with local police agencies to develop a training program without charge, and holds free regional training sessions across the State of Oklahoma. According to the evidence, Sheriff Moore elected not to pursue any of these options.

Id. n.7.

Why, if Burns was required by law to participate in CLEET training, the adequacy of which is not questioned, should the sheriff be faulted for electing not to pursue additional options, rather than simply for failing to ensure Burns' attendance at CLEET? This is perhaps the most troubling aspect of the Fifth Circuit's opinion: its suggestion that, despite having a comprehensive training program with no identified deficiencies, a county may nevertheless be found at fault for failing to commit additional resources to supplement such training.

This Court's standard for a single-incident failure-to-train claim boils down to a simple question: whether violation of a federal right is the obvious consequence of "a particular glaring omission in a training regimen." *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. at 410. In answering this question, the Fifth Circuit would allow a jury to consider evidence relating to such matters as personal

background, on-the-job performance, family relationships, and supervisory issues, none of which could move the jury any closer to answering the question. In addition, it would allow the jury to skip this central question altogether — decline to find that the training regime contained an omission, glaring or otherwise — and move directly to a finding that the failure to provide additional training demonstrates deliberate indifference.

Permitting a jury to fail to consider the central question in this Court's standard of liability, in addition to permitting it to consider various irrelevant questions, is error that merits correction by this Court.

CONCLUSION

The judgment of the Fifth Circuit should be reversed, and judgment rendered in favor of Bryan County.

Respectfully submitted,

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